Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

IRIS C. WOOD,
Petitioner,

vs.

JAMES BILLINGTON, LIBRARIAN OF CONGRESS
Respondent.

On Petition For Writ Of Certiorari
To United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does a non-probationary employee of the Library of Congress have a property right in employment protected by 5th Amendment due process guarantees? Does a non-probationary attorney employed at the Library of Congress have a property right in employment protected by 5th Amendment due process guarantees?

(2) Does a non-probationary employee of the Library of Congress have a liberty interest that is protected by 5th Amendment due process guarantees? Does a non-probationary attorney employed at the Library of Congress have liberty interest that is protected by 5th Amendment due process guarantees?

(3) Do Fifth Amendment due process guarantees require that non-probationary 905 series attorneys at the Library of Congress have the same appeal rights to the MSPB, EEOC, and the OSC, as non-probationary 905 series federal attorneys in the Executive Branch?

(4) Do Fifth Amendment due process guarantees require that non-probationary 905 series attorneys at the Library of Congress have the same procedural due process guarantees to federal courts as non-probationary 905 series federal attorneys in the Executive branch?

(5) Does the penumbra of the United States Constitution require that Library of Congress (Article I) non-probationary 905 series federal attorneys have the same procedural due process guarantees to the MSPB, EEOC, and OSC as do non-probationary 905 series federal attorneys in the federal government (Articles II and III)?

(6) Does the penumbra of the United States Constitution require that the Library of Congress (Article I) non-

probationary employees have the same procedural due process guarantees to MSPB, EEOC, and OSC as do other non-probationary federal employees (Articles II and III)?

(7) Does the penumbra of the United States Constitution require that Library of Congress (Article I) non-probationary 905 series federal attorneys have the same procedural due process guarantees to federal courts as do non-probationary 905 series federal attorneys in the federal government (Articles II and III)?

(8) Does the penumbra of the United States Constitution require that the Library of Congress (Article I) non-probationary employees have the same procedural due process guarantees to federal courts as do other non-probationary federal employees (Articles II and III)?

(9) Did the Library of Congress reject a written Congressional directive regarding ADA compliance that adversely affected Library of Congress employees?

(10) Has the Library of Congress inflicted adverse impact upon its employees who are protected by the American with Disabilities Act?

(11) Has the Library of Congress inflicted adverse impact upon its female employees protected by Title VII of the Civil Rights Act of 1964?

LIST OF ALL PARTIES

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5th Amendment to the United States Constitution

Title VII of the Civil Rights Act of 1964, 42 U.S. C. Section 2000e, *et seq.*

Americans with Disabilities Act, 42 U.S.C. 1201, *et seq.*

D.C. Circuit Rule 35

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OPINIONS BELOW

The court of appeals' opinion is not reported. The opinion of the district court is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2006. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY ISSUES INVOLVED

The court of appeals has upheld the district court opinion in reversing the rule in *AFSCME Local 247 v. Billington,* 740 F. Supp. 1, 2 (1990) that a non-probationary employee of the Library of Congress has a property right in federal employment. All other Circuits recognize that a non-probationary federal employee has both a property and liberty interest in employment. It is compelling for he Supreme Court to render a decision resolving these conflicts.

The appellant's denial of her 5th Amendment guarantees of due process require her reinstatement as Assistant General Counsel of the Library of Congress with appropriate back pay, promotions, and benefits. The Library of Congress is an Article I institution of the US Congress. This Court now has the opportunity to grant certiorari to resolve whether non-probationary federal employees (Articles I, II, & III) all have a property right in their employment or not.

The district court ruled that since its opinion was not published under the District of Columbia Rule 35, there was no tarnishing of the appellant that would injure her future employment opportunities. The district court gave little if any weight that the appellant, an Assistant General Counsel of the Library of Congress in charge of contract review, was subjected to three fitness for duty examinations by her boss who was suffering from a brain tumor and who had previously subjected her to harassment, battery and false imprisonment. The decision of the Hearing Officer of the Federal Mediation and Conciliation Service (FMCS) finding that the appellant, Mrs. Wood, was fit for duty was overturned by the Deputy Librarian, without a constitutionally required written opinion or any reason or justification.

In an attempt to support the opinion of the district court, the court of appeals did not address the issue of whether a non-probationary employee of the Library of Congress has a liberty interest in future employment.

These due process issues are very important to Library of Congress employees and compel the Supreme Court the render a decision.

Neither the district court nor the appellate court justified the failure of the Library of Congress to make reasonable accommodation to the appellant's life debilitating physical conditions within the meaning of the Americans with Disabilities Act. These include the appellant's orthopedic surgery, chronic-interstitial cystitis, precariously patched heart from a ventricular septal defect in size between a nickel and a quarter, and her heart arrhythmia with resulting nervous tension. Office stress and tension were worsened by battery and false imprisonment by John Kominski, who retired with full federal benefits following a diagnosed brain tumor while employed without forced mental examinations.

The testimonies of Dierker and Greenfield indicated John Kominski's yelling and other abusive behaviors in the work place constituted a threat to his subordinates, especially to the weakest employee physically, Mrs. Wood. Yet Kominski irrationally accused Mrs. Wood of being a threat to the work place, while his abusive behavior may be attributed to the effects of his brain tumor.

Kominski refused to recuse himself from the fitness for duty panel that orchestrated the appellant being placed upon leave without pay in 1995. There was no determination that a termination of Mrs. Wood's employment in 1999 would further the "efficiency of the service" as required under federal law.

Between 1995 and 1999 she was suspended from her job at the Library of Congress on leave without pay. This constituted constructive termination or possibly the longest suspension without a hearing in history.

The Federal Mediation and Conciliation Service (FMCS) May 2001 decision to reinstate Mrs. Wood's employment at the Library of Congress with back pay and benefits was erroneously disregarded by the Deputy Librarian of the Library of Congress.

There was never a rebuttal by the Library of Congress to the medical opinions by Stephen Rojcewicz, M.D., psychiatrist that Mrs. Wood was fit for duty. There is no final agency finding of fact or law to contradict the decision of the hearing officer of the FMCS. This failure denied the appellant procedural and substantive due process guaranteed under the 5th Amendment to the United States Constitution.

STATEMENT OF THE CASE

The appellant brings her case under both the 5th Amendment property right and liberty interest and under Title VII of the Civil Rights Act of 1964, 42 USC 2000(e), for prohibited discrimination by the Library of Congress against her on the basis of sex.

Mrs. Wood also brings this case under the Americans with Disabilities Act for the Library of Congress' refusal to accommodate her after orthopedic surgery to be fully ambulatory in 1993. The Library of Congress also refused to accommodate her heart condition and falsely labeled her as mentally disabled as a pretext to terminate her federal employment.

The hostile environment imposed by Kominski was traumatic and stressful to her heart condition in particular. Her heart arrhythmia/palpitations and bladder conditions were worsened by the intentional infliction of stress and duress by Library of Congress General Counsel John Kominski.

But for her sex (female) and history of heart problems since birth, she would not have suffered a battery and false imprisonment from her immediate supervisor, John Kominski, the responsible management official (RMO) for Library of Congress legal staff. He prayed upon Mrs. Wood's vulnerabilities.

But for her sex and her life threatening heart conditions, the alleged discriminating official (ADO) Kominski would not have imposed a hostile work environment. He constructively terminated appellant's federal employment by placing her on leave without pay from 1995 to 1999.

But for her sex and heart problems, the Deputy Librarian would not have denied her 5th Amendment guarantees of due process in overturning the thirty-five page decision of the Hearing Officer from the Federal Mediation and Conciliation Service in her favor. The Deputy Librarian fired Mrs. Wood with no written opinion or findings of fact. Under the Library of Congress' constitutionally inadequate procedures, the plaintiff has no appeal rights beyond the Deputy Librarian.

The appellant petitions for a writ of certiorari from this Court upholding the opinion of the Hearing Officer from the Federal Mediation and Conciliation Service granting her reinstatement as an Assistant General Counsel of the Library of Congress. Plaintiff's motion for summary judgment should be approved by this Court and the summary judgment

in favor of the Library of Congress must be vacated. Moreover, the appellant was denied the jury trial to which she was entitled.

The district court reversal of the *AFSCME Local 247 v. Local 247 v. Billington,* 740 Fed. Supp. 1, 4 (1990) adversely affects not only the appellant but approximately forty two hundred (4200) non-probationary employees of the Library of Congress. Each of these, like Mrs. Wood, has completed a federal probationary period and has an expectation of continued employment absent removal for misconduct or inadequate performance.

Mrs. Wood completed her GS-12 probationary year at the Library of Congress and was thereafter promoted to a GS-13 Assistant General Counsel in the 905 attorney series established by the Office of Personnel Management (OPM). The appellant attorney was cognizant that she had a property interest in her federal employment by her successfully competing for the Library of Congress vacancy announcement for GS-905-12/13/14 career ladder position. She is also cognizant that she has a liberty interest in her professional reputation as an attorney of thirty-one years with the capability for competing for further advancement to any GS/GM-905-15 vacancy after one year or longer as a GS -14.

District Court Judge Urbina's conclusion that the federal government did not contest the issue of property right in the 1990 AFSCME case is not persuasive. The AFSCME case is relied upon in Library of Congress collective bargaining agreements by management and by the several unions that represent the vast majority of the Library of Congress' employees.

The plaintiff raised expressly in her district court complaint that she had a property right in her federal employment at the Library of Congress. The plaintiff also

alleged to the district court that she was deprived of this property right without due process of law.

The appellant joined the Library of Congress in 1991 as the most qualified candidate for the announced vacancy of a GS-905-12 attorney position to provide legal support for contracting. She not only completed her probationary period as a GS-12 but was later promoted to a GS-13 Assistant General Counsel of the Library of Congress. In her prior employment as a GS-905-13 attorney in contracts for the U.S. Army and in her entire employment at the Library of Congress Mrs. Wood was never sighted for poor performance.

The summary affirmance by Appellate Judges Randolph, Tatel and Brown of the Memorandum Opinion of District Court confirms Judge Urbina's overturning the rule in *AFSCME Local 247 v. Billington,* 740 F. Supp. 1, 4 (D.D.C. 1990), i.e., that each non-probationary Library of Congress employee has a property right in federal employment protected by 5th Amendment due process guarantees.

Moreover, Mrs. Wood's liberty interest in future employment is further tarnished by the Order of this Circuit Court, whether or not the disposition in this case is published or not under D.C. Circuit Rule 41. The Order erroneously concludes that the plaintiff does not have a liberty interest within the meaning of *Regents v. Roth,* 408 U.S. 564, 573 (1972) despite her being subjected to three "Star Chamber" fitness for duty examinations, each attempting to place her in a false light.

The district court opinion falsely concludes that the plaintiff failed to demonstrate for purposes of summary judgment that her suffering a hostile environment of harassment, false imprisonment, and battery by General

Counsel John Kominski did not establish a compelling *prima facie case* within the meaning of *McDonnell Douglas v. Green.* The Library of Congress refused to turn over RMO Kominski's report to the Library of Congress Office of Security to the hearing or court record. The Library of Congress refused to turn over the demand letter of Congress

in summer 1995 that the reluctant Library of Congress implement federal guidelines regarding mental fitness for duty in line with the executive branch.

The Order also erroneously concludes that appellees had a credible pretext for denying Mrs. Wood reasonable accommodation as a federal employee under the Americans with Disabilities Act (ADA) to elevate her leg at her desk following orthopedic surgery, to place her on leave without pay from 1995 to 1999, to remove her from federal employment without due process in violation of the Hearing Officer's finding that Mrs. Wood was <u>not</u> a danger to others, and failing to restore back benefits.

The Memorandum Opinion improperly relied upon by Judges Randolph, Tatel, and Brown, grossly misstates legal precedent and the factual record from the plaintiff's consolidated EEO complaints leading to the adverse decision in case 1:03-cv-01343-RMU. In expressly overturning the rule in A*FSCME Local 247 v. Billington, infra,* the district court not only destroyed plaintiff's property right in her federal employment but undermined the 5th Amendment due process rights of all other non-probationary federal employees at the Library of Congress.

Despite the guidance and budgeting from Congress, all employment at the Library of Congress is now at will. The whim of a supervisor is now the rule.

Judge Urbina ignored constitutional precedent over the previous sixteen (16) years that was favorable to the plaintiff. Judge Urbina also failed to construe material contested facts in favor of Mrs. Wood as the non-moving party, in granting summary judgment to defendant. This misapplies the rule in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255 (1986).

Judge Urbina failed to provide the plaintiff with a full evidentiary and demanded jury trial on disputed questions of facts. The district court viewed the following contested facts unfavorably against the plaintiff and in favor of the defendant, the moving party in the granted summary judgment:

(1) Can the Deputy Librarian of Congress ignore without making any factual or legal finding the thirty-five decision of the duly appointed Hearing Officer from the FMCS that the plaintiff is fit for duty and is owed back pay?

(2) Was plaintiff's alleged misconduct of once losing her composure when provoked by Kominski is so severe as to justify her involuntary separation from the federal service without due process regarding her property interest in federal employment?

(3) Did the Library of Congress perpetuate disparate treatment of Mrs. Wood by inflicting severe and excessive punishment while condoning the erratic and dangerous behavior of a man, John Kominski, suffering from a brain tumor?

(4) Can the Deputy Librarian ignore *Douglas* case factors that would have mitigated the extermination of her federal career?

(5) But for Mrs. Wood's sex (female), history of physical handicap conditions (heart arrhythmia, bladder condition, and nervous tension) and reprisal for prior protected activity (her consolidated EEO complaints), would Kominski have placed the plaintiff in a severely hostile environment and imposed leave without pay from 1995 to 1999 as a constructive termination of federal employment without due process?

(6) Could Kominski, with pending EEO complaints against him for false imprisonment and battery on Library of Congress premises, sit on a panel without recusal so as to subject Assistant General Counsel Wood to three ongoing fitness of duty examinations without justification and in violation of both the historic and Congress' prohibitions in 1995 against forced mental fitness for duty examinations?

(7) Was the failure of RMO Kominski to make reasonable accommodation within the meaning of the Americans with Disabilities Act for Mrs. Wood's heart problems, bladder condition, and nervous stress merely a perpetuation of his hostile environment in reprisal for her raising several EEO complaints against him as the alleged discriminating official Kominski?

(8) The Library of Congress has failed to rebut the medical conclusion of psychiatrist Dr. Stephen Rojcewicz that the plaintiff was and has been fit to return to federal employment.

(9) After plaintiff's establishing a compelling *prima facie case* of prohibited sexual discrimination regarding disparate treatment and reprisal as to how males are treated, how could an alleged symbolic "off with the head" hand gesture regarding the man who battered her justify the termination of her federal employment while the prohibited sexual discrimination, false imprisonment and battery by the

General Counsel of the Library of Congress be condoned and rewarded in retirement without a forced mental examination?

(10) Why should the plaintiff not have an expectation of a property interest in her employment after her competitive selection in a vacancy announcement in 1991 for a GS-12 staff attorney position, her successful completion of a one year probationary period, and her 1993 promotion to an Assistant General Counsel position that was established in the 1992 Congressional reorganization plan? Her promotion to a career ladder GS-13 was granted in accordance with her very good annual performance appraisal for the prior year.

Each of these ten factual issues wrongly decided by the district court and upheld upon appeal affect the proper disposition of this case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). They each compel this Court to correct resulting inconsistency among the Circuits as to the property right and liberty interest in federal employment. This Court must supervise the conduct of the district court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit.

This circuit court's failure to correct clear district court error reflects the need of Congress or this Court to reorganize the federal judiciary. An intermediate body between the court of appeals and this Court would have exclusive jurisdiction over revived historic writs of error.

The Library of Congress is created by the Legislative Branch under Article I powers of the United States Constitution. It is inherently evident that employees of the Library of the Congress of the United States are protected by the rule of law. They are not vassals of politicians or Library of Congress aberrant managers with reprisal agendas.

The Deputy Librarian and General Counsel John Kominski are two of the three leading non-elected officers of this Legislative Branch institution. They each violated the 5th Amendment due process procedural and substantive rights of Mrs. Wood.

They each flagrantly flaunted both Library of Congress and Congressionally mandated mental fitness for duty guidelines. Under the rule of *McDonnell Douglas v. Green*, the burden must shift to the Library of Congress to provide a plausible pretext why federal procedures were not complied with in fitness for duty examinations.

In 1993 the plaintiff filed a sex discrimination complaint against Kominski. As General Counsel he subjected the plaintiff to reprisal actions including three intrusive and unwarranted fitness for duty examinations in an ever increasingly hostile environment that contributed to traumatic stress.

The Deputy Librarian then ignored the thirty-five page finding of the Hearing Officer that Mrs. Wood was <u>not</u> a danger in the work place. Nevertheless, the Deputy Librarian fired the plaintiff in 1999 without providing her any due process review to contest his decision, an outcome with no written justification.

By rejecting the Hearing Officer's finding, the Deputy Librarian arbitrarily and capriciously ordered her separation from federal employment in violation of traditional notions of fair play and substantial justice guaranteed by the U.S. Constitution. Procedural due process under the *penumbra* U.S. Constitution requires that a federal deciding official must justify in writing any departure from a recommending official finding of fact, in this case, that the plaintiff was found <u>not</u> to be a work place "danger."

The Urbina opinion recognized that statistically women receive more frequent and harsher discipline at the Library of Congress. Yet, he declared that the false professional tarnishing of Mrs. Wood's reputation did not hurt her liberty interest because Urbina's incredible opinion is not published.

But for Mrs. Wood being female, but for her heart problems, and but for her prior participation in protected EEO activity, Library of Congress management would not have treated her disparately by ostracizing her from co-workers from 1995 to 1995 on leave without pay. The record reflects that no male or other person without protected EEO activity was as adversely treated by the Library of Congress.

At no time was there any attempt by Library of Congress management to provide reasonable accommodation to reduce office stress or even enable prompt healing of the plaintiff's orthopedic surgery. Management even denied her the modest request for enough room at her desk to elevate her leg for proper healing. At this time a one-foot plastic rodent was surreptitiously placed atop Mrs. Wood's filing cabinet. Kominski spit at her while he clenched his fist as he blocked her door and threatened to fire her. Shortly thereafter, Library of Congress Dispute Resolution Specialist Brad Weiss then threatened Mrs. Wood with transfer out of the attorney series to a contracts paper pusher position in another division.

From the mistreatment of Mrs. Wood, the Library of Congress has established itself as the backwater for employee rights in the federal government. The Library of Congress objected to Congress' attempt to adopt Americans with Disabilities Act protections applicable to its employees. The Library of Congress unduly delayed Mrs. Wood's recovery to a fully ambulatory condition. The Library of Congress

objected to the instruction by Congress to stop abusing its employees with mental fitness for duty examinations.

Instead, Library of Congress management contrived new schemes to inflict emotional and physical forms of traumatic stress upon Mrs. Wood who continued to struggle daily with a congenital heart defect that comprised a life threatening condition. Plaintiff's medical vulnerabilities enticed the bullies and misogynists at the Library of Congress to exploit her sadistically.

The hostile environment imposed by Library of Congress Management was intended but failed to provoke Mrs. Wood to loose her composure so as to make it appear that it was she who was dangerous to others and not Kominski. The FMCS Hearing Officer determined Ms. Wood as fit for duty.

Library of Congress management also failed in its effort to provoke or fabricate an alleged incident of insubordination. Since the Library of Congress also could not credibly challenge Mrs. Wood's work product as a competent Assistant General Counsel with contracting law expertise so as to remove her from federal service based upon performance, the hostile management sought new manipulations to harass Mrs. Wood to drive her out of the Library of Congress.

Plaintiff's hostile environment in January 1995 was worsened by RMO Kominski's physically blocking her from exiting his office door as false imprisonment. In so doing, he grabbed and wrenched her wrist following an interrogation in which the General Counsel fully lost his composure. The tall and big boned Kominski has a reputation for a hair trigger temper and emotional outbursts as confrimed under oath by co-workers Dierker and Greenfield.

The physically vulnerable plaintiff became extremely frightened by this false imprisonment and battery in violation of her constitutionally protected *Weingarten* rights during his interrogation. The callous response by the Library of Congress Security officer was that plaintiff's plight from the harmful touching and restraint was not sufficiently long enough in his view [not that of a reasonable person] to be considered false imprisonment in the harasser Kominski's private office.

In comparison, the Uniform Code of Military Justice defines rape, as "penetration, however slight, as sufficient to commit the offense." While the duration may have been "slight" in the mind of the Security Officer, to Mrs. Wood it seemed near an eternity, and it was sufficiently long for Mrs. Wood to suffer abrasions on her wrist from Kominski's fingers while he blocked her attempted exit from his private office. Therefore, the Library of Congress Security Officer failed to do his duty in deference to the power and position of General Counsel Kominski.

REASONS FOR GRANTING THE WRIT

Due to violation of the 5th Amendment guarantees, Library of Congress employees now have only the rights of second-class citizens to that of their Executive Branch (Article II) brethren and sisters. In contrast, both non-probationary competitive service and non-probationary selective service (Schedules A and B) employees have by Executive Order been provided the right to appeal their adverse personnel actions to the Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), and the Equal Employment Opportunity Commission (EEOC).

Since Mrs. Wood has not been afforded any right to an MSPB appeal or OSC and/or EEOC remedy or any due

process agency review of the adverse decision by the Deputy Librarian, the Library of Congress has also improperly denied her substantive and procedural rights in violation of the United States Constitution. Executive Branch attorneys do have appeal rights of adverse actions before the MSPB, not as misstated by Judge Urbina as a precedent to use against the plaintiff.

Unlike Schedule C excepted service employees, who serve at the pleasure of the Executive, the plaintiff had no reason to suspect that her property right won through competitive vacancy selection and perfected through the successful completion of a probationary period was subject to the employment "at will" whims of her General Counsel boss with a brain tumor or the Deputy Librarian who could not, or refused to state, the basis for terminating her federal employment.

The deciding official's failure to provide a factual or legal basis for Mrs. Wood's termination has not furthered the "efficiency of the service." The absence of a finding that her employment termination by the Deputy Librarian furthered the "efficiency of the service" is dispositive of this case.

Moreover, this Court is now compelled to provide assurance to all non-probationary federal employees under Articles I, II and III that their respective property rights and liberty interests in employment guaranteed by the 5th Amendment in federal employment will not be infringed. This Court must also guide all other circuits that there is a property and liberty interests of non-probationary federal employees within their circuits and the conflict has been resolved.

The Plaintiff's property right in her career position at the Library of Congress was never one of being a federal policy official whose tenure was subject to the results of a

presidential or congressional election. She has every expectation that her federal employment was secure from unconstitutional infringement.

Unlike many police and airline pilots who must undergo periodic mandatory examination to continue their respective employment requirements, Mrs. Wood as the Assistant General Counsel of the Library of Congress had no affirmative duty to do so under her position description. Mrs. Wood never encumbered or was ordered to encumber any position description that required her to subject herself to fitness for duty examination. This is dispositive of the failure of the Library of Congress to contrive a viable pretext to remove her from employment,

By her own strength of will, the plaintiff: (1) overcame her life threatening congenital heart defect, (2) was a farm girl who graduated from law school and passed the bar, (3) earned a Masters degree, (4) became one of the first hundred women bar members of her southern home state, and (5) rose to the position of an Assistant General Counsel and contracting expert for the Library of Congress.

When the plaintiff invoked EEO protected activity, she enraged the powers that be of her tiny federal enclave. The Library of Congress fiefdom promulgated inadequate at best, and conflicting at worse, internal procedures that grant few, if any, substantive or express procedural rights to its employees.

With conflicting sets of fitness for duty regulations, the Library of Congress always reserved for itself the ploy to allege falsely that an employee committed "misconduct" by not precisely following the "intended" procedures as the managers interpreted the rules. In his opinion, Judge Urbina calls this "insubordination."

However, these three sets of conflicting standards for fitness for duty over three examinations from 1994 to 2004 are themselves constitutionally suspect as not interpretable because of vagueness and over breadth. Since management could not support any insubordination pretext, it just continued to wear down the health of the plaintiff with fitness for duty examinations as the emotional equivalent of three successive rapes.

Those few employee rights that the Library of Congress has bestowed are through its collective bargaining agreements. The protection through the American Federation of State, County and Municipal Employees (AFSCME) was denied to the plaintiff.

As an attorney entrant at the Library of Congress with sixteen (16) years of prior legal and professional experience, Mrs. Wood served for one year as a GS-12 probationary employee reporting to Associate General Counsel Robert Lincoln. She successfully completed that probationary period.

At the time, her position was arbitrarily and capriciously classified by the Library of Congress management as excluded from the bargaining unit. Despite never being assigned any management or personnel duties so as to be legally excluded from the bargaining unit, the plaintiff, as a staff attorney, remained "management." Moreover, she was blocked promotion to a GS-14 career. She was denied the opportunity to compete for a supervisory GS/GM-15 position.

Her non-supervisory attorney position was part of a 1992 congressionally ordered reorganization plan for the Library of Congress Office of General Counsel staff. At every opportunity, the General Counsel Office of the Library

of Congress attempted to circumvent Congressional guidance, budgeting and oversight

General Counsel Kominski told the plaintiff that he could not reassign her from her career ladder because of the legislative mandate for it and her promotion. The position that Mrs. Wood encumbered was funded from Library of Congress sales. However, Kominski and the Deputy Librarian orchestrated Mrs. Wood's expulsion from federal employment.

Mrs. Wood's bargaining unit exclusion cannot withstand 5th Amendment scrutiny because she has been denied the opportunity to challenge her erroneous classification as outside of the bargaining unit. When the plaintiff raised the inadequacy of a "satisfactory" annual performance rating by Associate General Counsel Lincoln, she was bumped up organizationally to report directly to the abusive General Counsel, John Kominski, as her new rating official. The promotion in reporting to the General Counsel did not result in a pay increase. The plaintiff now seeks retroactive promotion to a GS-14 with back pay and benefits since her improper involuntary separation from federal service and interference with advancement in her career ladder.

Since Mrs. Wood was excluded from the bargaining unit, she never had any "standing" to invoke negotiated grievance procedures to contest any unfairly low performance rating or even enjoy *Weingarten rights* that are recognized as mandatory by this Court for bargaining unit employees in the Executive Branch.

In light of no *Weingarten* rights, RMO Kominski could more easily subject Mrs. Wood to his fitness for duty interrogations so that he could develop a pretext to remove her from federal employment. At no time was the plaintiff

ever authorized to have a union official present at such interrogations.

All circuits must consistently ensure that federal employees have uniformly protected property, liberty interest, and *Weingarten* rights. This will also help deter further assaults against female subordinates by overpowering males.

The same supervisor of which the plaintiff complained of sex discrimination, General Counsel Kominski, was not compelled to recuse himself from the four member panel that ordered Mrs. Wood to be scrutinized and "psychologically raped" by ongoing fitness for duty examinations. These brutal interrogations furthered the hostile environment and created traumatic stress injuries to inflict and open psychological wounds rather than provide reasonable accommodation under the ADA.

Plaintiff's health sensitivities of a damaged heart, nervous stress and orthopedic surgery made these ongoing stressful examinations even more hostile. Management ignored its affirmative duty to implement protections under the Americans with Disabilities Act, even for Mrs. Wood to be fully ambulatory as a major life function.

As a violation of 5th Amendment due process, the plaintiff is barred standing to file a certificate of unit petition to the Federal Labor Relations Authority (FLRA) to appeal her wrongful exclusion from the bargaining unit. Moreover, she was barred from her First Amendment Right of association to be in the bargaining unit and become a union member under the Federal Labor-Management Relations Act, which is hereby brought under constitutional scrutiny to this Court.

The Urbina opinion affirmed by the March 13 circuit court Order that perpetuates the fraud that Mrs. Wood, as a widowed Sweet Briar College graduate and southern farm girl from tobacco road in her fifties, is a "danger" to others in the work place. She has no history of physical or emotional outbursts of any kind.

The cheap shot aspersions by Library of Congress management of her being physically dangerous are ludicrous since she is passive, reserved, and vulnerable. Her health has been continuously frail since birth.

Judge Urbina contradicts himself to imply that her liberty interest in seeking future legal employment is not damaged by the Library of Congress' ongoing stigmatizing her with unwarranted mental health examinations.

In his decision at page 20, Judge Urbina overturns the federal court rule in *AFSCME LOCAL 2477 v. Billington,* 740 F. Supp. 1, 4 (D.D.C. 1990) that a non-probationary employee at the Library of Congress has a property interest in federal employment. His self-serving conclusion to reach his convoluted approval of the defendant's summary judgment motion is that the federal government did not contest the property question in this earlier case, or arguably in the sixteen years thereafter.

Judge Urbina has failed to address the fact that the District of Columbia Circuit recognizes that involuntary placement on administrative leave for eighteen months, let alone leave without pay for over four years, constitutes a separate property taking and a constructive termination of federal employment. Mrs. Wood was placed on leave without pay from 1995 to 1999.

The failure of Judge Urbina to follow case precedent of a property right for non-probationary Library of Congress

employees is outrageous. It is as vulgar as a white federal judge *sua sponte* attempting to reverse racial progress won over time by declaring that Congress did not intend expressly to extend Title VII protections to its employees. Urbina strangely implies that Title VII is the sole remedy for Mrs. Wood. He also attempts to nullify constitutional guarantees of due process as to a property right and liberty interest.

More speciously, Urbina relies on the superseded 1988 case of *Garrow v. Gramm,* 856 F. 2d 203, 207 (D.C. Cir.) for the false proposition that an agency "attorney does not have a property interest in federal employment." By Executive Order during his administration (1989-1993), President George Herbert Walker Bush, extended to career non-SES attorneys and other Executive Branch Schedule A excepted service employees their right to contest adverse actions to the Merit Systems Protection Board (MSPB).

In a further denial of due process, Mrs. Wood has been denied access to any MSPB, EEOC or OSC forum to challenge her involuntary separation from her federal employment. This Court must now provide relief of deprived constitutional rights with the expansion the scope of *Bivens* actions to Library of Congress employees and those involved in EEO or other protected activity, such as whistle blowing within the meaning of the federal Whistleblower Protection Act of 1989, as amended.

CONCLUSION

The plaintiff appreciates this opportunity to speak from her heart, as continuously injured as it has been. She requests that this Court take judicial notice that 92% of November 2006 voters sited government corruption as motivation for the exercise of their respective constitutional voting privilege in this republic. Similarly, two thirds of the

American public believe that the federal government eavesdrops on their personal phone calls. The Executive Branch admits now that it opens the public's mail.

It is time for the federal government to stop waging war on its own citizens, especially those with the courage to pursue EEO and other protected activity.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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Phone: 703-780-1864

Date: January 24, 2007

Supreme Court, U.S.

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

IRIS C. WOOD.
Petitioner.

vs.

JAMES BILLINGTON, LIBRARIAN OF CONGRESS,
Respondent.

On Petition For Writ Of Certiorari
To United States Court of Appeals for the
District of Columbia Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 055301 **September Term, 2005**
O3cv01343
Filed On: March 13, 2006 [955520]

Iris Croft Wood, *Appellant*
V.
James Billington, Librarian of Congress and United States of America, *Appellees*

BEFORE: Randolph, Tatel, and Brown, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. *See* Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir.1987) (per curiam). Summary judgment was proper as to appellant's claims of sex discrimination, disability discrimination, and retaliation, because appellant has not demonstrated that the proffered reasons for appellee's actions were pretextual, and that a reasonable trier of fact could infer intentional discrimination based on the evidence. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973); Tenyenckck v. Omni Shoreham Hotel, 365 F.3d 1139, 1151 (D.C. Cir. 2004). Further, appellant is not entitled to relief on her property interest claims because she has not demonstrated that she could be discharged only for cause. *See* Gilbert v. Homar, 520 U.S. 924, 928-29 (1997). Finally, appellant is not entitled to relief on her liberty interest claim because she has neither alleged nor presented evidence to establish that the appellee has publicized information tending

to stigmatize her. *See* Hutchinson v CIA. 393 F 3d 226, 231 (D. C. Cir 2005); Orange v Dist. of Columbia 59 F.3d 1267, 1274 (D.C. Cir. 1995).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IRIS CROFT WOOD,	:	
Plaintiff,	:	**Civil Action No.: 03-1343**
v.	:	**Document Nos.: 33, 34**
JAMES BILLINGTON,	:	
Librarian of Congress *et al.*,	:	
Defendants.	:	

MEMORANDUM OPINION
GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This case comes before the court on the defendants' motion for summary judgment and the plaintiff's motion for summary judgment. The plaintiff, a female former attorney in the Library of Congress' Office of the General Counsel, brings suit under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and the Fifth Amendment of the United States Constitution. Specifically, the plaintiff alleges that the defendants discriminated against her based on her sex and perceived mental disability, retaliated against her for engaging in protected activity and violated her Fifth Amendment rights by delaying the effecting of an appealable action and discharging her without due process. Because the plaintiff fails to establish that the defendants' reasons for suspending and terminating her were based on discriminatory animus and fails to establish a constitutionally protected property interest in her employment, the court grants the defendants' motion for summary judgment and denies the plaintiff's motion for summary judgment.

II. BACKGROUND

The plaintiff began working at the Library of Congress ("the Library") in June of 1991 when she was hired as a GS-12 attorney in the Office of General Counsel. Defs.' Statement of Undisputed Material Facts ("Defs.' Stat.") ¶ 1. [1] John Kominski, the Library's general counsel, hired the plaintiff and assigned to her work under the supervision of Assistant General Counsel Robert Lincoln. *Id.* ¶ *5.* In October of 1992, Mr. Lincoln gave the plaintiff a "satisfactory" performance evaluation. Defs. Stat. ¶ 5. Apparently angered by this evaluation, the plaintiff requested that Mr. Lincoln no longer supervise her. *Id.* ¶ *6*; Pl.'s Opp'n, Ex. 2 ("Wood Decl.") ¶ *3.* Consequently, Mr. Kominiski became the plaintiff's direct supervisor. Defs Stat. ¶ *7*; Wood Decl. ¶ 3. On June 2, 1993, the plaintiff filed an Equal Employment Opportunity ("EEO") complaint against Mr. Kominiski. Defs. Stat. ¶ 8. The complaint alleged sexual harassment, discrimination based upon sex, physical and mental handicap, denial of adequate office space, failure to timely promote and failure to reasonably accommodate. *Id.*

In October of 1993, the plaintiff underwent orthopedic surgery. Defs.' Stat. ¶ 11, Pl.'s Statement of Material Facts in Dispute ("Pl.'s Stat.) ¶ 11. Prior to the surgery, the plaintiff contacted Dr. Sandra Charles, the Library's Health Services Officer, seeking a larger office so that she could reorganize her work materials, minimize the need to stand and carry materials after the surgery and provide a large enough space to elevate her foot. Pl.'s Stat. ¶ 11. Dr. Charles, however, did not recommend that the plaintiff be provided with a larger

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[1] The plaintiff filed a paragraph by paragraph response to the defendants' statement of undisputed material facts. While the plaintiff purports to dispute many of the defendants' facts, many "disputed facts" merely consist of the plaintiff's subjective interpretation of historical occurrences or additional facts that the plaintiff believes add context to the defendants' recitation. Unless a genuine material factual dispute exists, the court cites to the Defendants' Statement.

office space. Defs.' Stat. ¶ 13. On October 20, 1993, Dr. Charles reported feeling threatened by the plaintiff's behavior in a parking lot. *Id.* ¶ 16. Dr. Charles stated that she was in the Library's parking garage when the plaintiff had driven up to Dr. Charles in a rapid manner, but stopped short of running into the side of her car. *Id.* Dr. Charles also reported that the plaintiff was gripping the steering wheel tightly, clenched her teeth and had her eyes squinted in a hard glaze. *Id.* The plaintiff simply denies that she ever made any threatening gestures towards Dr. Charles. Pl.'s Stat. ¶ 16.

On December 23, 1993, the plaintiff and her personal representative met with Brad Weiss, a mediator with the Library's Dispute Resolution Center ("DRC"), in an attempt to informally resolve the plaintiff's June 2, 1993 EEO complaint. Defs.' Stat. 18; Pl.'s Opp'n, Ex. 3 at 539. At the mediation, Mr. Weiss informed the plaintiff that Mr. Kominski offered to resolve her complaint by transferring her to another position in the Library. Defs.' Stat. ¶ 19. While Mr. Kominski asserts that the relocation offer provided for the plaintiff to remain employed as an assistant general counsel, the plaintiff believed that the transfer would be to a non-legal, administrative position. Defs.' Stat. ¶ 19; Pl.'s Stat. 19. Upon hearing the offer, the plaintiff became upset. Defs. Stat. ¶ 20; Pl.'s Stat. ¶ 20. Although the plaintiff disputes the extent of her anger, Mr. Weiss stated that the plaintiff became hysterical, was "shrieking and screaming," slammed her legal pad and body against the walls of his office and graphically described "cutting off her supervisior's head and putting it on a plate[.]" Dep. of Brad Weiss ("Weiss Dep.") (Attached to Defs.'s Mot. For Summ. J.) at 37-58; Dep. of Iris Wood ("Wood Dep.') (Attached to Defs.' Mot. For Summ. J.) at 89-93.

On February 3, 1994, a panel consisting of: (1) Mr. Kominski; (2) Dr. Charles; (3) Dr. Rodney Burbach, a consultant in psychiatry; and (4) Barbara Young, Chief of the

Employee Assistance Division, unanimously concurred that the plaintiff's behavior warranted a fitness-for-duty ("FFD") examination. Defs.' Stat. ¶ 23. On February 23, 1994, the Library's Human Resources Department notified the plaintiff that she would have to take a FFD examination and that she was required to call a psychiatrist selected by the Library by February 28, 1994, to setup an appointment. Defs.' Mot., Ex. 13. The Human Resources Department further informed the plaintiff that if she desired, she could submit her own list of three doctors by February 28, 1994, from which the Library would select one to perform the exam. *Id.* Human Resources informed the plaintiff that failure to take the exam or abide by the stated deadlines could result in a proposal that she be removed for insubordination. *Id.*

The plaintiff responded with a list of three alternative psychiatrists. Defs.' Stat. ¶ 26. From this list, the Library selected Dr. Martin Allen and instructed the plaintiff to contact Dr. Allen by April 1, 1994. *Id.* The plaintiff did not contact Dr. Allen by April 1, 1994, however, the plaintiff argues that she did not schedule an appointment because she did not receive background materials that she was entitled to review prior to the examination. Pl.'s Stat. ¶ 26. In response, on May 6, 1994, the Library provided copies of the documents that served as the basis for the FFD examination to the plaintiff's personal physician and directed the plaintiff to contact Dr. Allen by May 27, 1994. Defs.' Mot., Ex. 16. On May 13, 1994, the plaintiff filed a second EEO complaint alleging that Mr. Kominski continued to, *inter alia,* discriminate against her and sexually harass her. Defs.' Stat. ¶ 27. On June 9, 1994, the Library sent a letter to the plaintiff noting that she had failed to contact Dr. Allen by the required date, and giving her five days to explain why she had not done so. Defs.' Stat ¶ 29. The plaintiff claimed that she did not contact Dr. Allen by May 27, 1994, because she did not timely receive her background materials and that she had been traveling for "work related training and other matters"

during May. Pl.'s Stat. ¶ 28. The Library then scheduled a FFD examination for the plaintiff with Dr. Allen for July 11, 1994. Defs.' Stat. ¶ 30. After another delay due to the plaintiff's request for emergency leave, Dr. Allen examined the plaintiff on July 28, 1994. *Id.* ¶ 31.

Upon completion of his examination, Dr. Allen referred the plaintiff to a psychologist, Dr. Richard Filson, for further examination. *Id.* ¶ 32. The plaintiff, however, objected to further psychological testing, arguing that further tests were unnecessary and would not reveal probative information. *Id* ¶ 32-33. Ultimately, on October 7, 1994 the plaintiff called Dr. Filson to set up an appointment. In the course of leaving a voicemail, the plaintiff informed Dr. Filson that she considered any examination of her to be "psychological rape" and threatened to report Dr. Filson to the American Psychological Association. *Id.* ¶ 34. Subsequently, both Dr. Alien and Dr. Filson refused to continue evaluating the plaintiff because of threats the plaintiff made regarding legal action against Drs. Allen and Filson. *Id.* ¶ 34; Dep. of Dr. Martin Allen ("Allen Dep.") (attached to Defs.' Mot. for Summ. J.) at 35-36.

On January 23, 1995, the plaintiff filed a third EEO complaint reiterating earlier allegations against Mr. Kominski. Defs.' Stat. at 37. On February 8, 1995, the Library informed the plaintiff that in light of Drs. Allen and Filson's refusal to examine the plaintiff further, the Library would resume its administrative action against the plaintiff. *Id.* ¶ *35.* One week later, on February 15, 1995, Drs. Charles and Burbach concluded that after reviewing all available documentation, the plaintiff posed an unacceptable risk to the workplace. *Id.* ¶ 36. That same day, the Library informed the plaintiff that she had been placed on immediate administrative leave, and after exhaustion of leave time, would be indefinitely suspended without pay. *Id.* ¶ 38. In response, on March 23, 1995, the plaintiff filed her final EEO complaint.

Id. ¶ 39. The complainant alleged that her placement on enforced leave and suspension, debarment from Library premises and proposed removal were based on gender discrimination and perceived mental handicap discrimination. *Id.*

On June 21, 1995, Hiram L. Davis, the Deputy Librarian of Congress at the time, heard the plaintiff's appeal regarding her enforced leave. Defs.' Stat., Ex. 30. In dismissing the plaintiff's appeal, Mr. Davis determined that the medical evidence supported a conclusion that the plaintiff may have been an unacceptable safety risk to others in the workplace, was a detriment to Library operations and that the Library's decision to place her on enforced leave was appropriate. *Id.* Mr. Davis further concluded that because information in the record suggested that the plaintiff's return to duty could be a threat to safety and/or a disruption to Library operations, the plaintiff would have to retake a FFD exam and could not return to work until she completed the examination and was cleared to return to work. *Id.* Mr. Davis noted that resubmitting to a FFD exam was mandatory and that the plaintiff's failure to cooperate in the process could result in removal from her position. *Id.*

As part of the renewed FFD process, the plaintiff submitted a list of three psychiatrists to examine her, from which the Library chose Dr. Susan Fiester. *Id.* ¶ 42. On October 5, 1995, the plaintiff appeared for her examination by Dr. Fiester. However, during the examination, the plaintiff again asserted that Dr. Fiester was violating her civil rights under the ADA and violating the ethics of the American Psychiatric Association. *Id.* ¶ 43. Dr. Fiester perceived the plaintiff's comments as veiled threats of litigation and decided to terminate the session. *Id.*

On February 27, 1996, the plaintiff notified the Library that she would not threaten legal action or report any

physician to a professional body for participating in the Library's FFD process. *Id.* ¶ 44. On June *25,* 1996, the Library directed the plaintiff to undergo an examination by Medical Quality Management ("MQM"), an organization specializing in conducting medical evaluations. *Id.* On July 11, 1996, the plaintiff notified the Library that she objected to MQM performing the FFD examinations because it had requested the plaintiff to provide written assurances that she would not take legal action against MQM for conducting the evaluation and submitting their findings to the Library and because of an alleged conflict of interest. *Id.* ¶ 45; Pl.'s Stat. ¶ 45. In response to the plaintiff's refusal to undergo an examination by MQM, the Library concluded that further efforts to have the plaintiff submit to a FFD examination would be futile and on August 20, 1996, re-instituted administrative actions to remove the plaintiff from her Library service. Defs.' Stat. ¶ 46.

From August of 1996 through October 2, 1998, the plaintiff remained on enforced leave. *Id.* ¶ 47. The Library alleges that during this period, the parties were engaged in efforts to settle the plaintiff's various complaints. *Id* The plaintiff characterizes this time as a period of "limbo" where she could not appeal a final agency action. Pl.'s Stat. ¶ 47. After notifying the plaintiff of its proposal to remove the plaintiff from Library employment, the Library appointed a reply officer to receive oral and written statements from the plaintiff and other Library employees, review the statements in light of the proposed removal and make a recommendation to the Library deciding official. Defs.' Stat. ¶ 49. The reply officer recommended that the Library deciding officer uphold the plaintiff's removal and the Library's deciding officer concurred, concluding that the plaintiff's removal was warranted. *Id.* ¶11 50-51.

On November 3, 1999, the plaintiff appealed the deciding officer's decision to uphold removal. *Id.* ¶ 52. A

hearing examiner heard the plaintiff's appeal and concluded that the plaintiff's behavior warranted the Library's initiation of the FFD process and that the plaintiff had failed to cooperate in the FFD process. Defs.' Stat., Ex. 41. But, the hearing examiner also concluded that the plaintiff did not pose a risk to the workplace. *Id.* The hearing examiner recommended that the plaintiff be reinstated to her position and receive three years of back pay and benefits. *Id.* Finally, on June 21, 2001, Deputy Librarian of Congress Donald Scott, the final decision maker in adverse action appeals agreed with the hearing examiner's finding that the Library's regulations could support adverse action based on the plaintiff's failure to comply with the FFD process, but disagreed with the hearing examiner's conclusion that the plaintiff was not a threat to the workplace. *Id.* ¶ *55.* Ultimately, the Deputy Librarian of Congress upheld the plaintiff's removal from Library employment. *Id.* Subsequently, the plaintiff filed the instant suit. On December 8, 2004, the defendants filed a motion for summary judgment on all counts. That same day, the plaintiff filed her own motion for summary judgment on her Fifth Amendment due process arguments. The court now turns to those motions.

III. ANALYSIS

A. Legal Standard for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. *56(c); see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Diamond v. Atwood,* 43 F.3d 1538, 1540 (D.C. Cir. *1995).* To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution

could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *Id.*

In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Greene*, 164 F.3d at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

B. Legal Standard for Sex Discrimination

To prevail on a claim of sex discrimination under Title VII, a plaintiff must follow a three-part burden-shifting analysis generally known as the *McDonnell Douglas* framework. *Lathram v. Snow*, 336 F.3d 1085, 1088 (D.C. Cir. 2003). The Supreme Court explained the framework as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of

> discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection" . . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination . . . . The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248,252-53 (1981) (internal citations omitted) (quoting *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)).

To establish a prima facie case of sex discrimination, the plaintiff must show that (1) he is a member of a protected class; (2) he was similarly situated to an employee who was not a member of the protected class; and (3) he and the similarly situated employee were treated disparately. *Holbrook v. Reno*, 196 F.3d *255*, 261 (D.C. Cir. 1999). "The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. If the plaintiff establishes a prima facie case, a presumption then arises that the employer unlawfully discriminated against the employee. *Id.* at 254. To rebut this presumption, the employer must articulate a legitimate, non-discriminatory reason for its action. *Id.* The employer "need not persuade the court that it was actually motivated by the proffered reasons." *Id.* Rather, "[t]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

If the employer successfully presents a legitimate, non-discriminatory reason for its actions, "the *McDonnell Douglas* framework with its presumptions and burdens disappears, and the sole remaining issue is discrimination *vel non*." *Lathram*, 336 F.3d at 1088 (internal citations omitted). At this point, to survive summary judgment, the plaintiff "must show that a reasonable jury could conclude from all of the evidence that the adverse employment decision was made for a discriminatory reason." *Id.* (citing *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998) (en banc). The court must consider whether the jury could infer discrimination from (1) the plaintiff's *prima facie* case, (2) any evidence the plaintiff presents to attack the employer's proffered explanation, and (3) any further evidence of discrimination that may be available to the plaintiff. *Waterhouse v. District of Columbia*, 298 F.3d 989, 992-93 (D.C. Cir. 2002) (quoting *Aka*, 156 F.3d at 1289). The plaintiff need not present evidence in each of these categories in order to avoid summary judgment. *Aka*, *156* F.3d at 1289. Rather, the court should assess the plaintiff's challenge to the employer's explanation in light of the total circumstances of the case. *Id.* at 1291.

C. A Reasonable Juror Could Not Conclude That the Plaintiff's Suspension or Termination Was Based on a Discriminatory Reason

1. The Plaintiff Establishes a Prima Facie Case for Sex Discrimination

The defendants first argue that the plaintiff cannot establish a prima facie case of sex discrimination because she cannot identify a similarly situated employee. Defs.' Mot. at 16. The plaintiff responds by arguing that identifying a similarly situated employee is not an absolute requirement to demonstrate a prima facie case of sex discrimination. The plaintiff is correct. Although courts frequently look to see if a plaintiff satisfies the *Holbrook* factors to establish a prima facie case for sex discrimination, the Supreme Court noted

that the *McDonnell Douglas* framework is not intended to be "rigid, mechanized or ritualistic" and that "the precise requirements of a prima facie case can vary depending on the context." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002) (internal quotation omitted). Accordingly, the D.C. Circuit has articulated an alternative formulation of a Title VII prima facie case. A plaintiff must establish that "(1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Stella v. Mineta*, 284 F.3d 135, *145* (D.C. Cir. 2002). Of course, one common way to demonstrate that an unfavorable action gives rise to an inference of discrimination is by demonstrating that a similarly-situated individual was treated differently. However, *Stella* makes clear that pointing to a similarly-situated individual that was treated differently is not the *only* way to establish a prima facie case for sex discrimination. *Id.*

Here, the plaintiff points to evidence that out of the 37 psychiatric FFD examinations the Library ordered between 1991 and 1995, the Library sought removal, suspension or enforced leave in seven of the cases. Pl's Opp'n at 16. Of these seven cases, six involved females. *Id*. The plaintiff also notes that the Library stayed nine cases in which it sought FFD examinations. In those cases, eight of the nine employees were male. *Id.* The defendant does not contest those facts. *See generally* Defs.' Reply. The court concludes that in light of this evidence, the plaintiff has carried her burden of producing an inference of discrimination. *Burdine*, 450 U.S. at 253. Consequently, the burden shifts to the defendants to articulate a legitimate, non-discriminatory reason for its actions. *Burdine*, 450 U.S. at 253.

2. The Defendants Articulate Legitimate, Non-discriminatory Reasons for Their Actions

The defendants here easily carry their burden. The defendants have provided extensive evidence that the plaintiff

either was, or was perceived to be, a threat to workplace safety and was insubordinate. First, the plaintiff made repeated threats against co-workers. *See, e.g.* Defs.' Exs. 7 (memorializing Dr. Charles' observation of the plaintiff's threatening gesture with her car); 10 (memorandum from the Dispute Resolution Center recounting the plaintiff's threats to cut her supervisor's head off and "angry," "hostile" and "hysterical" behavior in the Dispute Resolution Center); 11 (summarizing a meeting where several Library employees described the plaintiff's anger and threats toward supervisors); 25 (memorializing Dr. Charles and Dr. Burbach's opinion that the plaintiff's threats to harm others and emotional instability constituted a risk to the workplace); Weiss Dep. at 56 (noting the plaintiff's stated desire to cut her supervisor's head off and put it on a plate); Wood Dep. (stating that "I think I said John's head should be on a platter"). Furthermore, it is clear that the plaintiff was insubordinate by repeatedly thwarting and delaying FFD examinations by making direct or veiled threats of litigation against the examining physician. *See, e.g.*, Allen Dep. at 35-36; Fiester Dep. at 36-37. To state the obvious, threats of violence and insubordination both constitute legitimate, non-discriminatory reasons for suspending or terminating an employee. *Clark v. Runyon*, 218 F.3d *915*, 919 (8th Cir. 2000) (threats); *Smith v. Leggett Wire Co*, 220 F.3d 752, 759 (6th Cir. 2000) (threats); *Smith v. New York Times*, 955 F. Supp. *558*, 560 (D.S.C. 1996) (threats), *aff'd*, 107 F.3d 867 (4th Cir. 1997); *Williams v. Verizon Wash., DC, Inc.*, 266 F. Supp. 2d 107, 122 (D.D.C. 2003) (insubordination); *Richard v. Bell Atlantic Corp.*, 164 F. Supp. 2d 10, 22 (D.D.C. 2001) (insubordination).

3. The Plaintiff Fails to Demonstrate That the Adverse Employment Action Was Made for a Discriminatory Reason

Because the defendants have met their burden of producing a legitimate, nondiscriminatory reason for their

actions, the plaintiff must present evidence demonstrating that the adverse employment action was made for a discriminatory reason. *Lathram*, 336 F.3d at 1088. The plaintiff fails to do so. As noted, once the defendant meets its burden, the court must consider whether the jury could infer discrimination from (1) the plaintiff's prima facie case, (2) any evidence the plaintiff presents to attack the employer's proffered explanation, and (3) any further evidence of discrimination that may be available to the plaintiff. *Waterhouse*, 298 F.3d at 992-93.

As an initial matter, the plaintiff's prima facie case is not compelling, in this case, in light of the strong evidence of legitimate reasons for termination and the absence of any countervailing evidence, the limited sample size that the plaintiff relies on to establish her prima facie case is not persuasive. *Pollis v. New School For Social Research*, 132 F.3d 115, 121 (2d Cir. 1997) (rejecting an inference of discrimination drawn from a statistical analysis with a sample size of eight, and stating that "[t]he smaller the sample, the greater likelihood that an observed pattern is attributable to other factors and accordingly the less persuasive the inference of discrimination to be drawn from it); *Simpson v. Midland-Cross Corp.* 823 F.2d 937, 943 n.7 (6th Cir. 1987) (noting that many courts "recogniz[e] that small statistical samples provide little or no probative force to show discrimination"); *Coble v. Hot Springs Sch. Dist. No.* 6, 682 F.2d 721,733 (8th Cir. 1982) (concluding that 15 decisions over 8 years was an insufficient sample size to infer sex discrimination).

Next, the plaintiff's attempts to discredit the Library's proffered explanation fail. The plaintiff first alleges that she was treated less favorably than similarly-situated males. Because no males in her department were forced to undertake FFD exams and some males under the same supervisor were promoted ahead of her, the plaintiff argues that these facts demonstrate the defendants discriminated against her. Pl.'s

Opp'n at 17-18. To show that she was similarly-situated to male employees in her department, the plaintiff must demonstrate that "all relevant aspects of her employment situation were nearly identical" to those ofthemaie employees. *Neuren v. Adduci, Mastriani, Meeks & Schill,* 43 F.3d 1507, 1514 (D.C. Cir. 1995) (internal quotation omitted). Here, the plaintiff fails to demonstrate that any of the males in her department made threats against co-workers or impeded efforts to conduct FFD examinations, but were not suspended or terminated. The plaintiff does not unequivocally deny that, for instance, she made a threat to cut off her supervisor's head. Rather, the plaintiff simply states that she couldn't really remember what she said or that the threats weren't real threats because she was "just blowing off steam" or using an "expression." Pl.'s Opp'n, Ex. 3 at 607. Similarly, she cannot deny that she told examining physicians that they were violating her rights or that a FFD examination was "psychological rape." Pl.'s Stat. ¶ 34. Instead, the plaintiff simply states that she was entitled to voice her opinion. Because the plaintiff cannot point to any similarly situated males that threatened bodily injury against a supervisor, or prevented FFD exams from going forward by making veiled threats of litigation against the treating physician, she cannot demonstrate that similarly-situated male employees were treated more favorably.

Finally, the plaintiff attempts to demonstrate that the defendants reasons for suspending and terminating her were a pretext for discrimination. The plaintiff alleges that she was cooperative in the FFD examination process, the Library violated its own regulations by forcing her to submit to a FFD and the Library based its termination decision on a FFD that the Library had previously discounted and rejected. Pl.'s Opp'n at 26-36. However, "[o]nce the employer has articulated a non-discriminatory explanation for its action. . . the issue is not the correctness or desirability of the reasons offered. . . but whether the employer honestly believes the

reasons is offers." *Fischbach v. Dist. Golunthia Dep't of Corrs.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (internal quotations omitted).

As noted, it is clear that the plaintiff thwarted and delayed her FFD examinations by making both overt and veiled threats of litigation to the physicians that examined her. The fact that the plaintiff personally believes that she did not interfere in the FFD process is of no moment. *Tolson v. James*, 315 F. Supp. 2d 110, 116 (D.D.C. 2004) (noting that a plaintiff's subjective view of her own job performance is irrelevant in establishing pretext). It is also irrelevant that the plaintiff disagreed with the wisdom, necessity or justification for continued psychological testing after her initial evaluation by Dr. Allen. *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994) (holding that "[i]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible. He must show that the explanation given is a phony reason"). The defendants have consistently noted the plaintiff's interference with the FFD process as insubordination justifying suspension and termination. *See, e.g.*, Defs.' Mot., Exs. 23, 24, 27, 31, 38, 42.

In the same vein, the plaintiff asserts that "[the Library's proffered reasons for termination should also be viewed as pretextual because it wrongfully based the termination on a FFD determination which the Library had previously discounted and rejected." Specifically, the plaintiff points to the Library's statement that Hiram Davis' August 16, 1996, decision "effectively superseded the Library's previous determination that [the plaintiff] was not fit for duty.]" Pl.'s Opp'n at 35. However, the court fails to see why the fact that Mr. Davis reinstituted the FFD process would preclude the Library from again reaching the conclusion that the plaintiff was unfit for duty. In fact, even though Mr. Davis reinstated the FFD process, he specifically noted that "[i]nformation contained in the record of this

matter does raise a serious question regarding your fitness and the possibility that your return to duty could result in a threat to safety and/or a disruption of library operations. It is noted also in this regard that you openly refused to deal with Library representatives in their attempts to communicate with you during your fitness-for-duty examination." Defs.' Mot., Ex. 31. Clearly, the reinstatement of the FFD process was not, as the plaintiff seems to believe, a determination that the plaintiff was not a threat or that she was cooperative during the FFD process.

The plaintiff argues that the only "new" information regarding her fitness for duty was from her own expert witness, Dr. Stephen Rojcewicz, who indicated that the plaintiff did not constitute an unacceptable risk in the workplace. Pl.'s Opp'n at 35-36. But, even if the plaintiff is correct in that she did not constitute an unacceptable risk in the workplace, "it is not enough [to demonstrate pretext] for a plaintiff to show that his employer's explanation was based on an inaccurate assessment of its employee's performance." *Olsen v. Mashall & Ilsley Corp.*, 267 F.3d 597, 602 (7th Cir. 2001); *George v. Leavitt*, 2005 WL 1148042, at *8 (D.C. Cir. May 17, 2005) (noting that even if a plaintiff demonstrates that an employer's reason for an action is proven false, she has not necessarily proven pretext "because an employer's action may be justified by a reasonable belief in the validity of the reason given even though that reason may turn out to be false"). Again, just because the Library did not receive further information supporting the conclusion that the plaintiff was a risk to the work place, that does not preclude the Library from reaching the same conclusion it did in 1995.

Finally, the plaintiff argues that she has demonstrated pretext because the Library did not follow its own procedures concern FFD examination when it offered her the opportunity to reengage in the FFD process in 1998. Specifically, the plaintiff alleges that the Library amended its regulations

concerning when a FFD exam could be ordered, and that under the new regulations, ordering the plaintiff to undergo a psychiatric exam was improper. Pl.'s Opp'n at 32. The defendants respond by noting that even if a FFD exam is voluntary under the current regulations, the Library is not precluded from taking action against an employee who exhibits the type of conduct the plaintiff engaged in. Defs.' Reply at 14.

Even if the Library's regulations did not permit it to order the plaintiff to take a psychiatric exam in 1998, "[a]n employer's failure to follow its own regulations and procedures, alone, may not be sufficient to support the conclusion that its explanation for the challenged employment action is pretextual." *Fischbach*, 86 F.3d at 1183 (internal quotation omitted). As explained above, the plaintiff presents no other credible evidence that the Library's motives were discriminatory. For instance, if the plaintiff could have pointed to a male employee who made threats and was uncooperative in the FFD process, but was not suspended or terminated, she may have rebutted the employer's proffered non-discriminatory reason for its actions. Similarly, if the plaintiff demonstrated that the Library fabricated the threats she voiced, that would also lend credence to her claim. However, at best, the plaintiff merely attempts to downplay the seriousness of her threats, characterizing them as "just blowing off steam" or "fantasies." Pl.' s Opp'n, Ex. 31. Contrasting the overwhelming evidence that her supervisors consistently took the plaintiff's threats seriously and that the plaintiff was insubordinate with the plaintiffs unsupported, bare allegations of discrimination, the court concludes that the plaintiff has failed to establish that "the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Accordingly, the court grants the defendants' motion for summary judgment on the plaintiff's sex discrimination claim.

D. The Plaintiff Cannot Establish a Claim for Retaliation

The plaintiff next claims that the defendants retaliated against her for engaging in protected activity. The plaintiff notes that after she filed her first EEO complaint, the Library subjected her to FFD exams and then proposed her removal after subsequent EEO complaints. Pl.'s Opp'n at 19-20. The *McDonnell Douglas* framework also applies to the plaintiff's retaliation claims. *Lathram*, 336 F.3d at 1089 n.3. Therefore, even assuming *arguendo* that the plaintiff established a prima facie case for retaliation, her claim ultimately fails for the same reasons her sex discrimination claim fails. The plaintiff presents no new, independent evidence as to why the court should view the employer's proffered reasons for suspending and terminating her as pretextual. Thus, the defendants are also entitled to summary judgment on the plaintiff's retaliation claims. *Burdine*, 450 U.S. at 256.

E. The Plaintiff Cannot Establish a Due Process Claim

The plaintiff next argues that the defendants violated her due process rights when they indefinitely suspended her and fired her. Pl.'s Mot. at 1. At the very outset, the plaintiff fails to establish a claim. To prevail on a due process claim, the plaintiff "must first show that the interest he asserts is a constitutionally protected property interest." *Block v. Powell*, 348 F.3d 1060, 1068 (D.C. Cir. 2003). Moreover, "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Despite what the plaintiff may believe, the mere fact that she is employed by the federal government does not confer a Constitutionally protected property interest in her employment. *Garrow v. Gramm*, 856 F.2d 203, 207 (D.C. Cit. 1988) (concluding that an attorney did not have a property interest in federal employment). Rather, "[s]uch interests can only be created by understandings, statutes or rules that secure certain

benefits and that support claims of entitlement to those benefits." *Id.* In her motion for summary judgment, the plaintiff simply asserts that "[a]s a federal employee, Plaintiff had a property interest in her employment[.]" Pl.'s Mot. at 7. Conspicuously absent is any discussion, analysis or citation of any legal authority that would establish a protected property rest in the plaintiff's employment. *Id.*; *Garrow*, 856 F2d at 207 (noting the plaintiff's failure to point to any source that would establish property rights in his federal employment). In the plaintiff's opposition to the defendants' motion for summary judgment, the plaintiff does cite one case, *AFSCME Local 2477 v. Billington*, 740 F. Supp. 1, 4 (D.D.C. 1990), for the proposition that she had a property interest in her position at the Library of Congress. Pl.'s Opp'n at 36. It is true that the *AFSCME Local 2477* court operated on the assumption that Library of Congress employees have a property interest in their employment because the parties did not dispute that fact. *AFSCME Local 2477*, 740 F. Supp. at 4. It is also true that here, the defendants again failed to contest whether the plaintiff had a protected property interest in her employment. However, it is the plaintiff's burden to establish a property interest in continued employment. *Crull v. Sunderman*, 384 F.3d 453, 469 (7th Cit. 2004); *Watson v. Univ. Utah Med. Ctr.*, 75 F.3d 569, 578 (10th Cit. 1996); *Soeken v. Herman*, 35 F. Supp. 2d 99, 104-05 (D.D.C. 1999). Consequently, despite the defendant's failure to raise the issue, the court will not simply assume that a property interest exists. As noted, the plaintiff fails to present any facts or analysis as to why she has a property interest in her employment with the Library of Congress. Accordingly, the court dismisses the plaintiff's due process claims.

F. The Plaintiff Cannot Establish a Violation of the Rehabilitation Act

Finally, the plaintiff alleges that the defendants discriminated against her in violation of the ADA because they regarded her a having a mental disability. Compl. ¶ 47.

As an initial matter, the court notes that the ADA is inapplicable to federal employees. 42 U.S.C. § 12111 (5)(B)(i) (specifically excluding the United States as an "employer" covered by the ADA); *accord Calero-Cerezo v. Dep't of Justice*, 355 F.3d 6, 12 n. 1 (1st Cir. 2004); *Rivera v. Heyman*, 157 F.3d 101, 103 (2.d. Cir. 1998); *Woodruff v. Mineta*, 215 F. Supp. 2d 135, 138-39 (D.D.C. 2002).[2] Consequently, the court could simply dismiss the plaintiff's disability discrimination claim without further comment. However, because the Rehabilitation Act, which is the correct basis for a disability discrimination claim by a federal employee, expressly incorporates the standards for a claim under the ADA, the court goes on to the merits of the plaintiffs claim. 29 U.S.C. §§ 701 *et seq; Lester v. Natsios*, 290 F. Supp. 2d 11, 23 n.2 (D.D.C. 2003).[3]

The defendants argue that the plaintiff's suspension and termination stemmed from her insubordination and threatening behavior, not a perception that she suffered from a mental disability. Defs.' Mot. at 24. The plaintiff counters by pointing to the Library's March 17, 1995, Notice of Proposed Adverse Action in which the Library stated that "[i]t is proposed that you be removed from your position for reasons of disability... in light of the fitness determination, you are considered to be permanently disabled." Pl.'s Opp'n at 21 (quoting Defs.' Mot., Ex. 27). Despite the defendants' statement, the plaintiff argues that she is not actually disabled. Pl.'s Opp'n at 23. The Library discriminated against her,

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[2] While the Congressional Accountability Act ("CAA") makes the ADA applicable to the Legislative Branch, the CAA is inapplicable to Library employees. 2 U.S.C. § 1301(3); *accord Baker v. Library of Cong.*, 260 F. Supp. 2d 59, 64 (D.D.C. 2003).

[3] Additionally, "[b]ecause of the similarity between the ADA and the Rehabilitation Act, 'cases interpreting either are applicable and interchangeable.'" *Scarborough v. Natsios*, 190 F. Supp. 2d 5, 19 n.10 (D.D.C. 2002) (quoting *Gorinan v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998)).

argues the plaintiff, because it mistakenly regarded the plaintiff to be disabled and took adverse action against her because of the Library's inaccurate perception that she was disabled. *Id.*

What the plaintiff fails to recognize is that to succeed on her Rehabilitation Act claim, "it is not enough that the employer regarded [her] as somehow disabled; rather the plaintiff must show that the employer regarded [her] as disabled *within the meaning of the ADA.*" *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 646 (2d. Cit. 1998) (emphasis in the original); *see also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999). A person is not disabled for the purposes of the ADA, and thus the Rehabilitation Act, unless the individual suffers from "a physical or mental impairment that substantially limits one or more of the major life activities[.]" 42 U.S.C. § 12102 (2). Thus, the plaintiff must demonstrate that the Library regarded her mental disability as one that substantially limited a major life activity. *Sutton*, 527 U.S. at 489 (noting that to be considered disabled within the meaning of the ADA when a plaintiff claims she is not actually disabled, the employer must believe that the plaintiff has a substantially limiting impairment); *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cit. 1996) (stating that if a plaintiff has direct evidence that an employer relied on the presence of a disability as a reason for making an adverse employment decision, the plaintiff bears the burden of establishing that he or she is disabled).

Although the plaintiff does not clearly lay out her argument, it appears that the "major life activity" that she believes the defendant perceived her to have substantial limitations on is the ability to work. The Supreme Court has clearly held that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiff allege they are unable to work in a broad class of jobs. . . one

must be precluded from more than one type of job, a specialized job or a particular job of choice." *Sutton*, 527 U.S. at 491-92. Thus, the plaintiff must present evidence that the Library regarded the defendant as unable to work as an attorney generally, as opposed to the defendant being unable to work as an attorney in the Office of the General Counsel of the Library of Congress. *Id.*

The plaintiff presents no evidence that the Library considered her to be unable to work as an attorney. Rather, the entirety of the plaintiff's argument is that: (1) the defendants labeled her as disabled in their March 1995 Notice of Proposed Adverse Action; and (2) she is not actually disabled. Pl.'s Opp'n at 20-26. Of course, the plaintiff's evidence that she is not actually disabled is irrelevant if the defendants never considered her to be disabled within the meaning of the ADA. The evidence demonstrates that, to the extent the defendants considered the plaintiff mentally disabled due to emotional instability, her disability precluded her from working in the Library of Congress' General Counsel's Office, not as an attorney generally. Def.'s Mot., Ex. 27 at 3 (stating that "you have been found emotionally unfit *for duty as an Assistant General Counsel, GS-13*") (emphasis added). Moreover, the March 1995 Notice of Proposed Adverse Action – the only evidence that the plaintiff offers as evidence that the Library regarded her as disabled – was superseded by a 1998 Notice of Proposed Adverse Action. The 1998 Notice of Proposed Adverse Action did not make any mention of disability. *Compare* Defs.' Mot., Ex. 27 *with* Defs.' Mot., Ex. 31. The defendants' evidence indicates that it has consistently cited the plaintiff's threats against Dr. Sandra Charles, Bob Lincoln and John Kominski and her insubordination in thwarting the FFD process as reasons for her termination. *See*, e.g., Defs.' Mot. Ex. 7, 10, 11, 23, 27, 31, 33, 40, 42. Thus, to the extent the defendants characterized the plaintiff's emotional instability and insubordination as a "disability," the evidence amply

demonstrates that the defendants were specifically referring to her inability to work under the supervision of, and threatening behavior towards Bob Lincoln and John Kominski, her threatening behavior towards Dr. Sandra Charles, and her insubordinate attitude (as demonstrated by her active sabotage) regarding the FFD process. There are no allegations or evidence presented by the plaintiff that the Library viewed her as unable to work under the supervision of *any* employer or that the plaintiff was unable to comply with *any* directions from supervisors. Rather, it is clear that the defendants regarded her as unable to work in the *specific* job of the Assistant General Counsel in the Library of Congress due to her threats against *specific* supervisors and refusal to comply with *specific* directives. Accordingly, the plaintiff cannot prevail on her ADA claim. *Sutton*, 527 U.S. at 489.

IV. CONCLUSION

For the foregoing reasons, the court grants the defendants' motion for summary judgment and denies the plaintiff's motion for summary judgment. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 10th day of June, 2005.

RICARDO M. URBINA
United States District Judge

(3)

No. 06-1103

In the

Supreme Court of the United States

IRIS C. WOOD,
Petitioner,

Vs.

JAMES BILLINGTON, LIBRARIAN OF CONGRESS
Respondent

On Petition For A Writ Of Certiorari
To United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

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As per Supreme Court Rule 44.2, the petitioner herein respectfully moves this Court for an order to (1) vacate its March 19, 2007, denial on the Petition for Writ of Certiorari, presented on January 24, 2007, and (2) to grant this Petition for Rehearing. As grounds for this motion, petitioner respectfully states the following:

1. The Grant of Certiorari in *Ledbetter vs. Goodyear Tire and Rubber Company.* Also see USCA-DC *Miller v. Navy* of January 19, 2007.

By far the most frequent reason for granting a timely petition for rehearing after the denial of certiorari is the intervention of another case of substantial or controlling effect not previously presented. In this *Wood* case, there are two pertinent cases. Supreme Court Practice, 8th Edition, p. 730.

In Docket 05-1074, this Court granted certiorari in *Ledbetter vs. Goodyear Tire and Rubber Company*, a similar case (private sector) regarding Title VII sex discrimination and scope of damages prior to filing. District Judge Urbina in *Wood v. Billington* concluded (in this civilian public sector case) that women are treated more harshly than men at the Library of Congress. Mrs. Wood was hired in 1991 at lower pay than her male counterparts prior to filing her 1993 complaint of prohibited discrimination. The *Miller v. Navy* case in the same DC District prohibits public sector gender based promotion discrimination as contrary to U.S. law.

As noted in *Ledbetter,* aggrieved individuals must file an administrative charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within one hundred and eighty days of the event. 42 U.S.C. Section 2000e-5e.

On C-SPAN Radio Supreme Court Oral Arguments on *West v. Gibson*, 1999, had related EEO concerns to the *Wood* case.

As a public sector employee at the Library of Congress, Mrs. Wood had no statutory procedure whatsoever to file a complaint with the EEOC or a "mixed" case with Merit Systems Protection Board (MSPB). This is not equal justice.

Similarly, Mrs. Wood has no statutory opportunity for relief from the Office of Special Counsel (OSC) or justice under the Congressional Accountability Act (CAA).

The *Ledbetter*, *Miller,* and *Wood* cases raise the appropriate scope of relief from a discriminatory discrete event. Both cases (private and public sectors) concern the present effect of past illegal acts and perpetuated consequences of forbidden discrimination. *United Air Lines, Inc. v. Evans,* 431 U.S.C. 553 (1977).

The issue stated in *Ledbetter* applies in *Wood*, i.e. whether and under what circumstances a plaintiff may raise sex discrimination under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside of the limitations period.

Mrs. Wood was not promoted from a GS-12 to a GS-13, (comparable to Navy LCDR pay in *Miller v. Navy*) until intervention of a Congressional pay plan and further Congressional action, similar to the ruling in *Miller* for remand to lower court and to the Secretary of the Navy for a Special Selection Board for promotion. Consistency in Circuit decisions would be to remand and direct Librarian Billington to convene a special promotion board. No male attorney at the Library of Congress with equal qualifications to Mrs. Wood, including a Juris Doctor degree, a Masters degree, and more than a decade of legal experience with expertise in Army contracting, procurement and administrative law, yet Mrs. Wood received the lower pay of a GS-12, and did not receive promotions as the men did.

Mrs. Wood overcame a congenital heart defect and history of open-heart surgery to earn these achievements only to be "disabled" by prohibited and discriminatory practices of managers of the Library of Congress in reprisal for her 1993 protected EEO activity citing disparate promotion chances for women and men.

The retaliation was so severe in her case that an archaic medical regulation, eliminated decades ago by the Executive Branch, was used against her as double reprisal. First, she suffered retaliation for her EEO activity questioning her promotions and pay. Second, after she and a few others were instrumental in getting the abusive regulation changed, her punishment has continued until this day, for 14 years.

Her efforts to pursue her original complaints about promotion and pay were drowned out by noise from endless retaliation, which continues to this day. The Library pursued their reprisal relentlessly for 14 years, yet never investigated her original concerns and complaints, or provided a final report, about pay and promotions. The Library EEO office even lost her original complaint file.

In *Ledbetter*, this Court must decide in the private sector whether there is a basis for an extra-textual limitation on "how far back" a plaintiff may reach for evidence to prove liability on an otherwise timely claim. Similarly, this Court should decide for the public sector how far back the Library of Congress refused Congressional urging to stop abusing its forced fitness for duty examinations, to adopt Americans with Disabilities Act standards, and to stop disparate impact against women regarding unfair pay or punishment policies.

The argument at page two of the *Ledbetter amicus* brief by the National Partnership for Women and Families applies in *Wood*. "Pay discrimination is rarely accompanied by overt bias, and employee salaries are notoriously cloaked in

secrecy. Victims thus have difficulty perceiving pay discrimination and, in any event, are unlikely to promptly complain about it. These difficulties are compounded for employees subjected to discrimination in their starting salaries, when much pay discrimination begins."

Despite her experience as a GS-905-13 attorney with the U.S. Dept of the Army, the Library of Congress low-balled Mrs. Wood's entering grade level because she is a woman. Challenging her initial GS-12 grade set her on a collision course with managers who consistently and intentionally stalled and "held back" her promotions with increased pay.

By early 1993, the pay and grade differential between Mrs. Wood and her male attorney peers had doubled or tripled. Despite her independence from need for supervision because of her knowledge and capability to do complex contracting work, the Library of Congress ignored the Office of Personnel Management (OPM) grade standards for her progression in her GS-905-12/13/14 career ladder position (paid from Library sales) because she was a woman.

When Mrs. Wood pressed her claim of prohibited discrimination in the disparate treatment of her and the disparate impact of women's substandard pay and promotion opportunity, she suffered further reprisals. Congress mandated to the Library of Congress that Mrs. Wood should receive promotions in her career ladder under her mandatory Promotion Plan from a GS-12 to that of a GS-14, as part of the Library's 1992 reorganization plan and budget for OGC Division. In reprisal, management kept Mrs. Wood at the ceiling of a GS-13; and then placed her on leave without pay from 1995 to 1999 to prevent her from receiving a further scheduled promotion to GS-14 in 1995 under her mandatory Promotion Plan, and from receiving further promotion to GS-15. The wrongful acts have always been about promotions.

The Library of Congress denied to Mrs. Wood, as a permanent employee, any meaningful due process review as to her placement on leave without pay in 1995, just prior to her scheduled promotion review. The Library denied to Mrs. Wood any meaningful due process review as to her contrived termination six years later, in 2001.

The argument at page three of the *Ledbetter amicus* by the National Employment Lawyers Association applies in *Wood.* "Each paycheck that delivers less to a black [or female?] than a similarly situated white [or male?] is a wrong actionable under Title VII, regardless of whether the fact that this pattern was begun prior to the effective date of Title VII." *Bazemore v. Friday,* 478 U.S. 385, 395-96 (1986).

"This holding honors the plain language of Title VII, makes practical sense, and has been consistently applied to the courts and federal enforcement agencies... It also ignores Congress' ratification of this Court's longstanding interpretation on the provision of Title VII that governs the timeliness of pay discrimination charges." *Ibid.*

Mrs. Wood respectfully requests joinder of her case with *Ledbetter.* Alternatively, Mrs. Wood respectfully requests a stay in deciding her case pending outcome of the *Ledbetter* decision, with the possibility of a favorable decision or remand in the *Wood* case to a jury trial at the District level.

Mrs. Wood's case involves not only statutory access to Title VII and ADA laws, including extreme reprisal, but also involves constitutional issues about due process, appeals, and property and liberty rights.

2. Violation of the Principles in *AFSCME Local 247 v. Billington,* 740 F. Supp. 1, 4 (1990) creates serious aberrations in decisions between those of the District of Columbia Circuit and all other Circuits.

District Court Judge Urbina and the District of Columbia Circuit have overturned sixteen years of precedent that a non-probationary federal employee has a property and liberty interest in his or her Library of Congress employment. Now all employment at the Library of Congress is at will.

The question of whether there are property and liberty rights in federal employment at the Library of Congress remains unresolved in light of the Library's actions against Mrs. Wood in both sexual discrimination and reprisals, complaints on March 23, 2007, regarding the former Assistant General Counsel Wood's non-selection in two recent attorney - vacancies at the Library of Congress.

3. The District of Columbia Circuit has increased uncertainty regarding substantive and procedural due process guarantees regarding all federal employment in contrast with other Circuits, and within its own Circuit as shown in *Miller v. Navy*, January 19, 2007.

The District of Columbia Circuit has recognized that seventeen months of administrative leave from a federal government position constitutes constructive termination of employment. However, Mrs. Wood suffered four years of leave without pay from 1995 to 1999. No federal court has addressed the failure of Library of Congress adjudicator Michael Shelley to issue a decision as to constructive termination. See *Miyai v. Dept of Transportation, 32 MSPR 15 (1968).*

Absent charges for 4 years, Mrs. Wood had no formal grievance to appeal. No federal court has addressed the "stale" nature of all charges against Mrs. Wood after years, the long-term stigma to this day from severe pre-textual or false charge, leading to "labeling" by co-workers, especially someone with a history of a handicap, or the extreme level of reprisals demonstrated by the Library's stalling for more than

four years, not the least of the damages were loss of pay, loss of promotions, and loss of reputation among co-workers. And no federal court has explained how each person involved in charges against Mrs. Wood was simultaneously tied to her EEO complaints and her boss Kominski, thus creating "Conflicts of Interests" in their actions. Indeed, her boss was a voting member on a committee to bring charges against her while her EEO complaints against him were pending.

No court has answered how the Library pretended for years and years to provide grievance and appeal rights, while never raising an objection or defense on the administrative or court levels, thereby, depriving Mrs. Wood of her due process right to argue the issues.

4. Compelling Reasons to Grant Certiorari under Supreme Court Rule 10

Justice Scalia was quoted in the February 21, 2006, Washington Post article about the grant of certiorari in the *Ledbetter* case, as saying, "I don't care much about your particular case, I am not about to produce a better result in your case at the expense of creating terrible results in a hundred other cases." Said another way Appeals cases must help many citizens, not just one. This *Wood* case addresses the rights of many thousands of Legislative Branch employees, while it corrects gross injustices against Wood.

The *Wood* case as currently ruled creates a terrible result for forty-two hundred (4200) Library of Congress employees, and more at GAO, CBO, and other related Article I agencies. If uncorrected for those public sector employees, the decision begins a slippery slope for undermining the property and liberty interests of over two million other civilian federal workers who work to improve the life of all citizens. Supreme Court Rule 10 channels certiorari considerations into basic categories. These include the federal or state

character of the court rendering the decision as to which review is sought. Rule 10, [with concerns] states:

> "Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. [self-fulfilling ?] The following, although neither controlling [unconstitutionally vague ?] nor fully measuring the Court's discretion [unconstitutionally broad ?], indicate the character of the reasons that the Court considers:
>
> (a) **A United States court of appeals** has entered a decision in conflict with a decision of another United States court of appeals on the same **important** matter...or **sanctioned such a departure by a lower court**, as to call for an exercise of this Court's **supervisory power...**"

5. Invocation of Mandatory Supervisory Power

Does the Court of Appeals of the District of Columbia Circuit *en banc* actually believe District Court Judge Urbina that non-probationary federal employment is at will? Judge Urbina failed to apply the mandatory Supreme Court standard that involuntary separation of a federal worker must meet the criterion of "furthering the efficiency of the service." *See Arnet v. Kennedy*, 94 S.Ct. 1633 (1974); Lloyd-LaFollette Act, 5 U.S.C. 7513(a).

In *Wood v. Billington*, arguably the most important Supreme Court case in the two hundred year history of the Library of Congress, we have a decision of a federal court of appeals that conflicts with sister courts "on the same important matter" of due process guarantees regarding federal non-probationary employment, and conflicts with its own Circuit rulings with the *Miller v. Navy* decision of January 19, 2007.

However, there is not a Library of Congress in every Circuit, only one such entity in the District of Columbia. Do we care if the rights of federal librarians get permanently shelved?

Mrs. Wood hereby petitions to invoke the U.S. Supreme Court's inherent supervisory power over lower courts.

6. Conflict between Decisions in Granting Certiorari

Judge Urbina abandoned the Supreme Court standard that an involuntary separation must further **"the efficiency of the service."** *Arnet v. Kennedy, Ibid.* Within the meaning of the 1995 Amendment to Rule 10, this is important for more than two million federal civil servants. Judge Urbina's District Court opinion reflects either a difference in general principle or reasoning from the view of property interest in federal employment by all other Circuits.

Judge Urbina expressly attributes to judicial dicta and inferred Justice Department laziness the failure of the federal government in 1990 to contest the notion of property in the *AFSCME Local 247 v. Billington* case decision. He implies that there is no *stare decisis* in the sixteen years thereafter that non-probationary Library employees have enjoyed a property interest in their federal employment and upon which Mrs. Wood relied in accepting her job offer in 1991. If permanent employees have no rights, then what is the difference in a permanent, probationary, and temporary employee or job at the Library of Congress?

A genuine conflict, as opposed to judicial whim, arises when it can be said with confidence that two courts have decided the same legal issues in opposite ways, based on their holdings in different cases with very similar facts. Such is the case with Wood, compared with other circuits and Wood compared with *Miller v. Navy* in the D.C. Circuit.

We must assume the sincerity of Judge Urbina and the District of Columbia Circuit *en banc* that supported his decision that expressly overturned legal precedent in the *AFSCME Local 247 v. Billington,* 740 Fed. Sup. 1, 4 (1990). This established the rule in 1990 that non-probationary employees of the Library of Congress have a property interest in employment protected by 5th Amendment due process guarantees. Due to the errant decision of Judge Urbina, upheld by the D.C. Circuit, both of which undermine the property interest rights for thousands of federal employees, this principle of fairness needs to be reaffirmed by the Supreme Court by its grant of Certiorari in *Iris C. Wood v. James Billington, Librarian of Congress.*

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, the petitioner prays that this Court reviews and reverses the judgment and opinion below and grant petitioner reinstatement of employment at the Library of Congress with back pay, plus benefits and other damages as mediated or awarded by a Jury of Peers.

Respectfully submitted,

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Date: April 13, 2007

CERTIFICATE OF PETITIONER

As the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

_____/s/_____
IRIS C. WOOD
Pro Se

Certificate of Service